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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GN HELLO DIRECT, INC., Plaintiff and Appellant, v. PLANTRONICS, INC., Defendant and Appellant.	H025605 (Santa Clara County Super. Ct. No. CV795824)

This appeal arises out of a dispute between a manufacturer and one of its distributors. In 2000, the distributor merged with the manufacturer's chief rival. After the merger was announced, but before it was finalized, the manufacturer terminated its long-term supply contract with the distributor. The distributor sued, asserting breach of contract, interference, and other claims; the manufacturer cross-complained. Some of the parties' claims were summarily adjudicated before trial, others were tried to a jury, and still others were tried to the court. For the most part, the manufacturer prevailed.

On appeal, the distributor asserts that the trial court erred by summarily adjudicating its contract claims, by excluding evidence in the jury trial, and by awarding attorney fees and costs to the manufacturer.

We reject the distributor's assertions and affirm the judgment.

FACTUAL BACKGROUND

1. The Parties

The plaintiff is GN Hello Direct, Inc. (GN/HDI). Prior to the merger that precipitated this dispute, it was known as Hello Direct, Inc. (HDI). HDI distributed telecommunications equipment through catalog sales, telemarketing, and the internet. In a merger announced in October 2000 and finalized the following month, HDI was acquired by a subsidiary of GN Netcom (GN). It became GN/HDI.

The defendant is Plantronics, Inc. (Plantronics). Plantronics designs and manufactures headsets and related telecommunications equipment. HDI was among the distributors of Plantronics headsets until it merged with GN, Plantronics' primary business competitor.

2. The Contract

Starting in 1996, Plantronics and HDI executed a series of contracts that provided for Plantronics to supply its products to HDI for distribution. On August 25, 2000, Plantronics and HDI entered into the agreement at issue in this litigation, which they called a Product Purchase Agreement (PPA or contract). Under the PPA, HDI received more favorable pricing than Plantronics' other distributors.

Two elements of the PPA are disputed here. The first is a clause prohibiting assignment; Plantronics claimed that HDI breached that clause by merging with GN. Also at issue are the PPA's provisions concerning termination; GN/HDI claimed that Plantronics breached those provisions by failing to give the required notice of termination.

3. The Merger and its Aftermath

In 1999 and 2000, HDI was "in play," that is, it was actively seeking a purchaser. In September 2000, less than a month after execution of the PPA, GN made a nonbinding proposal to acquire HDI by merger.

On October 3, 2000, HDI accepted GN's offer to merge. The following day, GN publicly announced the proposed purchase, which it termed a "definitive merger agreement." GN's tender offer for the HDI shares was scheduled to close November 8.

The tender offer was successful, and on November 9, 2000, HDI was acquired by a wholly owned subsidiary of GN. The transaction was structured as a reverse triangular merger, in which the acquisition target is the surviving entity. Following the merger, HDI changed its name to GN Hello Direct, Inc.; it also installed a new chairman and a new board of directors, all of whom were affiliated with GN.

Meanwhile, Plantronics unilaterally terminated its contract with HDI. On October 24, 2000, Plantronics sent a letter advising HDI that it was terminating the PPA effective immediately. That letter was followed by Plantronics' press release announcing its cancellation of the contract. Plantronics stopped shipping its products to HDI, although it did arrange for its other distributors to supply HDI. Plantronics also began contacting some HDI customers by telephone, informing them that it was no longer supplying its products to its former distributor.

PROCEDURAL HISTORY

1. Pleadings

In February 2001, GN/HDI filed a complaint asserting claims for (1) breach of contract; (2) declaratory relief under the contract; (3) specific performance of the contract; (4) interference with the contract; (5) interference with prospective economic advantage; and (6) unfair competition under Business and Professions Code section 17200.

Plantronics answered the complaint and cross-complained, alleging (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) fraud; (4) negligent misrepresentation; (5) unfair competition; and (6) entitlement to a declaration of its contract rights.

2. Summary Adjudication

In July 2002, Plantronics moved in the alternative for defense summary judgment or for summary adjudication of GN/HDI's causes of action for breach of contract, interference, and unfair competition.

The following month, GN/HDI filed its own defensive summary adjudication motion. That motion sought to eliminate the third and fourth causes of action of Plantronics' cross-complaint, which asserted fraud and negligent misrepresentation.

In September 2002, the trial court partially granted Plantronics' motion for summary adjudication while denying GN/HDI's. That decision eliminated GN/HDI's causes of action for breach of contract and for interference with contract. GN/HDI petitioned this court for a writ, seeking relief from the summary adjudication of its breach of contract claim and also seeking a stay of the proceedings. We summarily denied the writ petition.

The action proceeded to trial.

3. In Limine Proceedings

On October 7, 2002, the court heard the parties' motions in limine.

As relevant here, Plantronics moved to exclude certain evidence, which GN/HDI sought to present in support of its interference and unfair competition claims. That evidence concerned industry standards and Plantronics' internal policies with respect to direct contact with end users of the manufacturer's products. According to GN/HDI, Plantronics violated those standards and policies by contacting GN/HDI's customers and attempting to "unhook" them from the distributor. GN/HDI further argued that those actions constituted both interference and unfair competition.

After entertaining written and oral argument, the trial court granted Plantronics' motion to withhold that evidence from the jury.

4. Jury Trial

On October 8, 2002, a jury was impaneled. The following day, the jury heard opening statements. Evidence was presented over the course of the next two weeks. Closing arguments and instruction followed.

On October 23, the jury began its deliberations. Two questions were submitted to the jury. The first was whether Plantronics had unlawfully interfered with GN/HDI's prospective economic advantage. The second was whether GN/HDI was entitled to an offset. As to that question, the parties stipulated that GN/HDI owed Plantronics just over $1 million in unpaid invoices, subject to GN/HDI's disputed claim for warranty offsets. GN/HDI asserted that it was entitled to $538,400 in offsets. Plantronics disputed both the validity and the amount of GN/HDI's offset claim.

On October 25, the jury returned its first special verdict, finding against GN/HDI on its interference claim. On October 28, the jury returned its second special verdict, determining that GN/HDI was entitled to offsets in the amount of $250,000. After rendering its second special verdict, the jury was excused.

5. Bench Trial

On October 28, 2002, while the jury was deliberating its second verdict, the court conducted a bench trial on GN/HDI's claim of unfair competition. In addition to the evidence admitted in the jury trial, the court considered the previously excluded evidence relating to industry standards and Plantronics' internal policies on "unhooking." The court took GN/HDI's unfair competition claim under submission, denying it by formal order the next day.

6. Judgment (*November 2002*)

The court entered judgment on November 15, 2002. The four-page judgment begins by reciting the procedural history and elements on which it is based; it ends by announcing the net sum due Plantronics.

First, the judgment recounts the September 2002 order for summary adjudication, which disposed of GN/HDI's claims for breach of contract and interference with contract. It notes that GN/HDI thereafter abandoned its second and third causes of action, for declaratory relief and specific performance of the contract.

Next, the judgment reflects the court's nonsuit in GN/HDI's favor with respect to the third and fourth causes of action of Plantronics' cross-complaint, which alleged fraud and negligent misrepresentation. It further notes that Plantronics thereafter abandoned its second and fifth causes of action, which alleged breach of the covenant of good faith and unfair competition.

The judgment next refers to the jury trial and incorporates the jury's two special verdicts. As noted above, the jury first found against GN/HDI on its tortious interference claim; it next determined the offset due GN/HDI on Plantronics' contract claims.

The judgment then recounts the result of the subsequent bench trial, in which the court found against GN/HDI on its cause of action for unfair competition.

Finally, the foregoing recitations are incorporated into a section entitled "judgment," which methodically resolves all causes of action of the complaint and cross-complaint.

With respect to monetary damages, the judgment first orders that GN/HDI shall take nothing from Plantronics. Taking into account offsets and prejudgment interest, the judgment then orders that Plantronics shall recover from GN/HDI the sum of $879,623.93, together with postjudgment interest.

7. Posttrial Motions

Both parties brought posttrial motions in early December 2002. The court decided those motions the following month.

Plantronics moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial limited to the offset issue. In support of its motion, Plantronics asserted that there was no evidence to support the jury's finding that GN/HDI was entitled to an offset of $250,000.

GN/HDI also moved for partial judgment notwithstanding the verdict. Like Plantronics, GN/HDI took issue with the jury's decision setting the offset amount at $250,000. GN/HDI claimed both that there was no evidentiary support for that amount and that the evidence proved its entitlement to $538,400.

The court refused to grant either party judgment notwithstanding the verdict. However, it did grant a partial new trial on the question of offset, having concluded that the jury's determination represented an apparent compromise.

8. Supplemental Judgment **(*March 2003*)**

Plantronics also moved posttrial for attorney fees and costs.

Following two hearings on the matter in early 2003, the court determined that Plantronics was the prevailing party. By formal order, the court granted Plantronics' motion as to a portion of the fees and costs it had requested.

In March 2003, the order was entered as a supplemental judgment, which awarded Plantronics $1,640,418 in attorney fees and $32,464 in costs.

9. Appeals

In its notices of appeal, GN/HDI indicated it was challenging the November 2002 judgment, various orders made before and after that judgment, and the March 2003 supplemental judgment for fees and costs.

Plantronics noticed a protective cross-appeal, but later abandoned it.

10. Amended Judgment **(*Submitted January 2004; Entered March 2004*)**

After the parties had submitted their briefs in this court, we notified them of our concern that the November 2002 judgment was not appealable, given the subsequent grant of Plantronics' motion for a new trial on the question of offset. As we indicated, if neither party challenged the new trial order—as appeared to be the case here—it would be sustained. (*Spencer v. Nelson* (1947) 30 Cal.2d 162, 165.) In the event a new trial order is sustained, the underlying judgment is vacated and no appeal may be taken from it. (*Ibid.*; see also, e.g., *Neff v. Ernst* (1957) 48 Cal.2d 628, 634; *Marshall v. Brown* (1983) 141 Cal.App.3d 408, 414.) Applying that rule here, this appeal necessarily would await final judgment following trial on the offset issue. We requested supplemental briefing on the point.

In response, the parties agreed to replace the November 2002 judgment with a "[Proposed] Amended Judgment," which they submitted to this court in January 2004. The amended judgment effectively vacates the postjudgment order for partial new trial. It substitutes the parties' stipulation that Plantronics is entitled to a net recovery of $1,094,361 against GN/HDI.[1] The amended judgment leaves unchanged the remainder of the November 2002 judgment.

By letter dated January 16, 2004, we notified the parties that we would treat the amended judgment as the judgment from which this appeal was taken. The parties subsequently submitted a file-stamped copy of the amended judgment, which was entered in March 2004.

Having resolved our concern over appealability, we now proceed to consider the appeal on its merits.

ISSUES AND CONTENTIONS

I. GN/HDI first challenges the summary adjudication of its claim for breach of contract. It offers two grounds for that challenge. The first ground concerns assignment. As to that ground, GN/HDI takes issue with the trial court's conclusion that the reverse triangular merger employed here violated the contract's anti-assignment clause.

[1] The amended judgment shows the calculation used to determine the net amount due Plantronics on its cross-claim for breach of contract. That calculation is as follows: $1,003,748 owed Plantronics for products shipped before contract termination, less an offset of $151,000 due GN/HDI on warranty claims, resulting in net judgment of $852,748 for Plantronics. With interest from March 15, 2001, Plantronics' total net recovery is $1,094,361.

GN/HDI's second ground of attack on the summary adjudication order concerns contract termination. As to that ground, GN/HDI contends that there are triable fact questions relating both to the timing of Plantronics' termination and to its compliance with the contract's termination provisions.

II. GN/HDI next challenges the exclusion of certain trial evidence, which it proffered to support its interference and unfair competition claims. GN/HDI claims that the jury should have heard evidence of industry standards and Plantronics' internal policies concerning "unhooking."

III. GN/HDI's final appellate contention concerns the trial court's award of fees and costs. In essence, GN/HDI argues that the award was premature, because it is based on the summary adjudication of GN/HDI's contract claims challenged in this appeal.

DISCUSSION

I. Contract Claims

As a framework for evaluating GN/HDI's claims that the trial court erred in summarily adjudicating its contract claims, we first summarize the principles that govern both the grant and review of summary adjudications.[2] Against that backdrop, we then proceed to the merits of GN/HDI's claims.

A. Procedural Framework: Summary Adjudication

1. Trial Court Proceedings

Any party to an action may move for summary adjudication. (Code Civ. Proc., § 437c, subd. (f)(1).) The object of the summary adjudication procedure is to expedite litigation by eliminating the unnecessary trial of claims. (See, e.g., *Catalano v. Superior*

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[2] As a general rule, "the principles governing summary judgment also apply to summary adjudication. [Citation.]" (*Grant-Burton v. Covenant Care*, *Inc.* (2002) 99 Cal.App.4th 1361, 1370; see also, e.g., *Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.)

Court (2000) 82 Cal.App.4th 91, 96-97 [summary adjudication]; cf., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 [summary judgment].)

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) To dispose of a cause of action, the moving party must show that it has no merit. (*Id.* at subd. (p)(2).) "A cause of action has no merit if either of the following exists: [¶] (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded. [¶] (2) A defendant establishes an affirmative defense to that cause of action." (*Id*. at subd. (o).)

To the extent that the decision turns on a legal question, "it is the duty of the trial court on a motion for summary judgment to hear and determine the issue of law. [Citation.]" (*Varni Bros. Corp. v. Wine World*, *Inc.* (1995) 35 Cal.App.4th 880, 886.)

To the extent that the decision turns on factual questions, the trial court assesses the evidence in light of the parties' respective burdens. Ultimately, the moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) Initially, however, the movant carries the lighter burden of production, which requires only "a prima facie showing of the nonexistence of any triable issue of material fact . . . ." (*Ibid*.) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for." (*Id.* at p. 851.) "A burden of production entails only the presentation of 'evidence.' [Citation.] A burden of persuasion, however, entails the 'establish[ment]' through such evidence of a 'requisite degree of belief.' [Citation.]" (*Id*. at p. 850, citing Evid. Code, §§ 110, 115.)

If the moving party makes the necessary initial prima facie showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); see, *Aguilar v.*

Atlantic Richfield Co., *supra*, 25 Cal.4th at p. 850.) If the party opposing summary adjudication presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856.)

Throughout the process, "the court must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while that of the opponent is liberally construed. (*Id.* at p. 843.)

If the court summarily adjudicates one or more causes of action of a plaintiff's complaint, trial of the action proceeds only as to the remaining causes of action. (Code Civ. Proc., § 437c, subd. (n)(1).)

2. Appellate Review

On appeal, we review the grant of summary adjudication de novo. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860 [summary judgment]; *Lunardi v. Great-West Life Assurance Co.*, *supra*, 37 Cal.App.4th at p. 819 [summary adjudication].) We are not bound by the trial court's stated reasons for its grant of summary judgment. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.) We review the ruling itself, not the trial court's rationale. (*Ibid*.; accord, *Martinez v. Scott Specialty Gases*, *Inc.* (2000) 83 Cal.App.4th 1236, 1244.)

In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. (*Varni Bros. Corp. v. Wine World*, *Inc.*, *supra*, 35 Cal.App.4th at p. 887.) First, we identify the issues. Next, we determine whether the moving party has established facts justifying adjudication in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Ibid*.)

Applying the foregoing principles, we begin by identifying the issues. GN/HDI raises two: whether the merger effected a prohibited assignment, and whether Plantronics' contract termination was proper. We take each in turn.

B. Assignment

The contract between Plantronics and HDI contains a clause prohibiting assignment "by operation of law or otherwise" without consent.[3] In its summary adjudication order, the trial court concluded that the merger constituted a prohibited assignment, which foreclosed GN/HDI's contract claims.

GN/HDI contends that its merger did not violate the anti-assignment clause. First, GN/HDI asserts, there was no assignment, because HDI's acquisition was structured as a reverse triangular merger. Alternatively, GN/HDI argues, the court improperly determined disputed factual issues concerning assignment, specifically the parties' intent and the existence of prejudice.

Plantronics disagrees. According to Plantronics, GN's acquisition of HDI effected an assignment as a matter of law, notwithstanding its accomplishment through a reverse triangular merger. Furthermore, Plantronics argues, the parties' agreement was intended to protect against this very transaction, which was highly prejudicial to it.

In resolving the question of whether the merger constituted a prohibited assignment, we first set forth the relevant principles of assignment law. We then apply those principles to the facts of this case, as developed in the summary adjudication proceedings below.

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[3] The anti-assignment clause is found at paragraph 16.1 of the contract. It provides in full as follows: "This Agreement and all rights and obligations hereunder, excepting the right to receive payment, are personal to the parties hereto and may not be assigned in whole or in part, whether by operation of law or otherwise, by either party without the prior written consent of the other."

1. General Principles

Broadly speaking, the term "assignment" includes both the assignment of contract rights and the delegation of performance. (See Com. Code, § 2210, Uniform Commercial Code Comment, com. 1; Rest.2d Contracts, § 328, pp. 44-45.) Assignment may occur by voluntary action or by operation of law.

Assignment may be prohibited in a particular case, either by the parties' agreement or by law. However, it has long been our state's policy "to facilitate the freest possible transfer of valuable contract rights, while at the same time respecting the parties' intentions." (*Farmland Irrigation Co. v. Dopplmaier* (1957) 48 Cal.2d 208, 222; see Com. Code, § 2210, Cal. Code Com., com. 3.) "The statutes in this state clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts. (Civ. Code, §§ 954, 1044, 1458.) The terms and purpose of a contract may show however, that it was intended to be nonassignable." (*Farmland Irrigation Co. v. Dopplmaier*, *supra*, 48 Cal.2d at p. 222.)

Whether a particular contract prohibits assignment, and under what circumstances, depends in the first instance on the parties' intent. (See, e.g., *Farmland Irrigation Co. v. Dopplmaier*, *supra*, 48 Cal.2d at p. 222; *Davis v. Basalt Rock Co.* (1951) 107 Cal.App.2d 436, 445.) The parties' intent is manifested through their written agreement, but extrinsic evidence also is admissible in a proper case. (See, e.g., *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40.)

In addition to limitations on assignment resulting from the parties' intent, the law prohibits assignment where it "would materially change the duty of the other party, or increase materially the burden or risk imposed on him or her by his or her contract, or impair materially his or her chance of obtaining return performance." (Com. Code, § 2210, subd. (2).)

2. The Trial Court's Ruling

In this case, Plantronics defended against GN/HDI's claim for breach of contract on the ground that the merger constituted a prohibited assignment, which barred GN/HDI's claim. The trial court endorsed that defense. It ruled that assignment "occurred upon GN Netcom's acquisition and merger of Hello Direct, Inc. which, absent consent by Plantronics, was barred by the express terms of the anti-assignment clause in the supply agreement and/or where prejudicial to Plantronics." In support of its conclusion, the trial court cited *Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal.2d 335, 344 (*Trubowitch*).

Reading the ruling in the context of the record, we may infer that the court made one or more of the following determinations in Plantronics' favor with respect to assignment: (1) *Intent*: The parties intended the anti-assignment clause to cover HDI's merger with GN. The proffered extrinsic evidence of intent was both undisputed and consistent with the anti-assignment clause; it was therefore admissible in the summary adjudication proceeding. Alternatively, even without resort to extrinsic evidence, there is no dispute that the parties intended the anti-assignment clause to cover HDI's merger with GN. (2) *Prejudice*: Regardless of the parties' intent, the anti-assignment clause was triggered because Plantronics was prejudiced by HDI's merger with GN. (3) *Merger*: Regardless of either intent or prejudice, the merger constituted an assignment by operation of law, which violated the anti-assignment clause.

As we observed above, we independently review the court's decision. We liberally construe the evidence in GN/HDI's favor. But if the admissible evidence supports its defense on any theory, Plantronics is entitled to summary adjudication of GN/HDI's contract claim.

We separately consider each inferable rationale for the trial court's ruling that we identified above, addressing them in reverse order. Thus, we first discuss merger by operation of law as a possible basis for summary adjudication in Plantronics' favor.

We then consider prejudice to Plantronics. Finally, we analyze the parties' intent. As we explain at that juncture, we find the uncontroverted evidence of intent dispositive of Plantronics' right to defense summary adjudication.

3. Analysis

a. Merger

As its lead contention, GN/HDI posits that its merger did not violate the anti-assignment clause, because, as a matter of law, a reverse triangular merger does not result in a transfer of rights. Grasping that contention requires some understanding of mergers, including their varying forms and their effects.

"A merger among corporations may take various forms." (2 Ballentine & Sterling, Cal. Corporation Laws (4th ed. Dec. 2003 update) Acquisitions, Mergers, Reorganizations, § 252.03, p. 12-14.) In an ordinary merger, two or more constituent corporations merge; one survives and the others disappear. (*Ibid*; see also *J. C. Peacock, Inc. v. Hasko* (1960) 184 Cal.App.2d 142, 150; Corp. Code, § 190 [defining "surviving corporation"].) In a regular or "forward" triangular merger, a "disappearing corporation is merged into a surviving corporation that is a subsidiary of a third (parent) party." (2 Ballentine & Sterling, Cal. Corporation Laws, *supra*, § 252.03, p. 12-14.) A variation is the reverse triangular merger.[4] In such mergers, the roles of surviving and the disappearing corporation are reversed; "the subsidiary of the third (parent) party is the disappearing corporation and merges into the 'acquired' corporation." (*Ibid.*) Thus, in a

[4] Reverse triangular mergers are sometimes referred to as "triangular phantom mergers" or "reverse triangular phantom mergers" or "reverse subsidiary mergers." (See 2 Marsh's Cal. Corp. Law (4th ed. 2004) Corporate Reorganizations § 19.01[H], pp. 19-18 – 19-20 [discussing the reverse triangular merger, which it terms a "triangular 'phantom' merger"]; *Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 791 [discussing shareholders' voting rights in a " 'reverse triangular "phantom" merger' "]; Ziff, *The Effect Of Corporate Acquisitions On The Target Company's License Rights* (Feb. 2000) 57 Bus. Law. 767, 787-788 [discussing the effect of "reverse subsidiary mergers" on anti-assignment clauses].)

reverse triangular merger, the acquisition target survives, but "immediately after the merger it is a wholly-owned subsidiary of the third-party parent." (*Id.* at p. 12-15.)

Mergers have complex and varied consequences. For our purposes, however, a merger's effect may be stated simply. "The merger of two or more corporations automatically results in the transfer by operation of law of all of the assets of each disappearing corporation to the surviving corporation . . . ." (2 Marsh's Cal. Corp. Law, *supra*, § 19.10[C], p. 19-103, citing *Kraft, Inc. v. County of Orange* (1990) 219 Cal.App.3d 1104; see also, Corp. Code, § 1107, subd. (a).) In a reverse triangular merger, the target corporation—the survivor—"continues to own its assets," even though "the acquirer now holds all of its stock." (Ziff, *supra*, 57 Bus. Law. at p. 783.) For that reason, reverse triangular mergers are sometimes used "to preserve the existing corporate entity" of a target company that owns licenses, permits, or other hard-to-transfer assets. (2 Marsh's Cal. Corp. Law, *supra*, § 19.01[H], p. 19-18.) "One widely-recognized advantage of employing a reverse subsidiary structure is that it purportedly obviates the issue of whether the merger constitutes a transfer of the target company's assets in violation of existing contracts, because the 'surviving company' is the same legal entity as the original contracting party." (Ziff, *supra*, 57 Bus. Law. at p. 787, fn. omitted; see also, Graubart, *Unintended Consequences: State Merger Statutes and Nonassignable Licenses* (Oct. 13, 2003) Duke L. & Tech. Rev. 25, 28-29.)

As a result of the reverse triangular merger here, the acquisition target—HDI—was the surviving corporation. GN/HDI focuses on that aspect of the merger, arguing that its status as survivor means that there was no change in corporate identity and thus no transfer of rights. Plantronics focuses on another aspect of the merger, the fact that HDI became the wholly owned subsidiary of its rival. Under the circumstances, Plantronics argues, there was a change in corporate control, with the result that the merger constituted an assignment by operation of law.

No California state court has yet addressed the question of whether a reverse triangular merger effects an assignment of the target corporation's assets by operation of law.[5] Nor will we. That interesting question will have to await another case and another day. We need not reach it, since we may resolve this dispute more simply, based on undisputed evidence of the parties' intent with respect to assignment. But before explaining that dispositive determination, we briefly discuss the other possible rationale for the trial court's decision, prejudice.

b. Prejudice

As noted above, even if the parties have not explicitly prohibited assignment, a court nevertheless may refuse to permit the transfer of rights where it "would materially change the duty of the other party, or increase materially the burden or risk imposed on him or her by his or her contract, or impair materially his or her chance of obtaining return performance." (Com. Code, § 2210, subd. (2); see also, e.g., *Masterson v. Sine* (1968) 68 Cal.2d 222, 230-231; *Trubowitch*, *supra*, 30 Cal.2d at pp. 344-345.)

As the California Supreme Court observed in *Trubowitch*, "if an assignment results merely from a change in the legal form of ownership of a business, its validity depends upon whether it affects the interests of the parties protected by the nonassignability of the contract." (*Trubowitch, supra,* 30 Cal.2d at pp. 344-345.) In *Trubowitch*, the court found no prejudice from the transfer. There, contract rights belonging to a dissolved corporation were transferred to its former stockholders after dissolution. (*Id.* at p. 345.) Here, by contrast, contract rights formerly under the control of Plantronics' distributor ended up under the control of a wholly owned subsidiary of its major competitor. In *Trubowitch*, the court concluded that the "seller's financial interests were fully protected." (*Id.* at p. 346.) Here, there was no such assurance of protection.

[5] There is some authority on the point from other jurisdictions. (See, e.g., Ziff, *supra*, 57 Bus. Law. at pp. 787-788, and cases cited in fns. 130-137.)

To the contrary, Plantronics believed the transfer of control of the contract rights threatened its business interests.

In the summary adjudication proceedings, Plantronics documented its belief that a merger between GN and HDI would jeopardize its interests, a concern it had expressed to HDI prior to entering the PPA. In response, GN/HDI acknowledged Plantronics' stated beliefs "that under the control of GN Netcom, HDI would lack an incentive to promote Plantronics vigorously" and, conversely, that HDI instead would have an incentive "to use the pricing advantage it enjoyed over Plantronics' commercial distributors to injure Plantronics' relationship with those distributors." But GN/HDI disputed the foundation for those beliefs. GN/HDI offered evidence that its continued distribution of Plantronics' products would benefit Plantronics, not harm it. That evidence was in the form of the declaration of its expert, who stated that "an important component" of HDI's business plan "was to be neutral as to which headset brand was sold."

Given the conflict in the evidence, we cannot say that prejudice to Plantronics was established as a matter of law. Nevertheless, on the question of assignment, the summary adjudication order in Plantronics' favor is proper. As we previously noted and as we now explain, the undisputed evidence of the parties' intent establishes Plantronics' entitlement to judgment as a matter of law on this point.

c. Intent

In its attack on GN/HDI's contract claims, Plantronics relied on evidence of the parties' intent that a merger between HDI and GN would constitute a prohibited assignment. In its response, GN/HDI challenged the admissibility of that evidence, citing the parol evidence rule.

Plantronics' Evidence:

Plantronics presented evidence of the negotiations leading up to the contract, which were conducted by the parties' respective chief executive officers, Plantronics' Ken Kannappan and HDI's E. Alexander (Alec) Glover. According to Plantronics' undisputed evidence, three days before the contract was signed, the two executives discussed the prospect of GN acquiring HDI. As described in Glover's deposition testimony, during that conversation Kannappan expressed concern "about signing this agreement if . . . Hello Direct was going to be sold to GN Netcom." Kannappan asked Glover whether there was "a clause in the contract that would protect . . . Plantronics in the case that—that GN Netcom . . .—that his major competitor . . . acquired Hello Direct." Glover replied that he "believed that there was such a clause." Although he did not have the contract in hand at the time of the conversation, Glover later surmised that the provision he "was remembering was an assignment clause."

As part of the negotiating history of the 2000 PPA, Plantronics also submitted evidence of a rejected draft contract that included a "change of control" provision. Under that rejected term, the agreement would "survive a change of ownership" by either party.

In addition, Plantronics submitted the parties' 1996 supply agreement, which—unlike the 2000 PPA—explicitly excepted mergers from the anti-assignment provision.

The foregoing evidence constitutes an adequate prima facie showing in support of Plantronics' defense. It demonstrates the parties' intent that a merger between HDI and GN would constitute a prohibited assignment. Plantronics' evidence thus sufficed to carry its initial burden of production on its defense summary adjudication motion.

GN/HDI's Response:

As a result of Plantronics' showing, the burden shifted to GN/HDI to demonstrate the existence of a triable issue of material fact on the question of the parties' intent. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

For its part, GN/HDI did not seriously dispute Plantronics' evidence of intent, nor did it submit opposing evidence on that point.

Instead, GN/HDI argued below, as it does here, that evidence of the contract's negotiation is inadmissible under the parol evidence rule. GN/HDI points out that the contract contains an integration clause. It asserts that the integration clause precludes "consideration of oral negotiations or communications during subsequent interpretation of the contract's intent." To address that assertion, we review and then apply the parol evidence rule.

The Role of Extrinsic Evidence in Contract Interpretation:

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club*, *Inc.* (2003) 109 Cal.App.4th 944, 955, citing Civ. Code, § 1636 and *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club*, *Inc.*, *supra*, 109 Cal.App.4th at p. 955 citing Civ. Code, § 1639.) Nevertheless, an inflexible "rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 37.)

As codified, the parol evidence rule provides that the terms of a final, integrated contract "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." (Code Civ. Proc., § 1856, subd. (a); see, e.g., *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 39; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167; see generally, 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 59, pp. 179-180.) But a written instrument "may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement." (Code Civ. Proc., § 1856, subd. (b); see, e.g., *James G. Freeman & Associates*, *Inc. v.*

Tanner (1976) 56 Cal.App.3d 1, 9; *Mangini v. Wolfschmidt*, *Ltd.* (1958) 165 Cal.App.2d 192, 198-199.)

The court determines whether the parties intended the contract to be a final and complete expression of their agreement. (Code Civ. Proc., § 1856, subd. (d); see, *Haggard v. Kimberly Quality Care*, *Inc.* (1995) 39 Cal.App.4th 508, 517.) "The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement. The instrument itself may help to resolve that issue." (*Masterson v. Sine*, *supra*, 68 Cal.2d at p. 225; see also, e.g., *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, *supra*, 109 Cal.App.4th at pp. 953-954.) The existence of an integration clause is a key factor in divining that intent. (See, *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, *supra*, 109 Cal.App.4th at pp. 953-954 [listing several factors, including the existence of an integration clause and the circumstances at contract formation]; *Haggard v. Kimberly Quality Care*, *Inc.*, *supra*, 39 Cal.App.4th at p. 518 [discussing the contract's two integration clauses and the circumstances at contract formation].) "This type of clause has been held conclusive on the *issue of integration*, so that parol evidence to show that the parties did not intend the writing to constitute the sole agreement will be excluded. [Citations.]" (2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 70, p. 190.)

But even where an integration clause manifests the parties' intent that the contract is a final and complete expression of their agreement, parol evidence nevertheless may be admissible as an aid to interpreting the contract. (*Haggard v. Kimberly Quality Care*, *Inc.*, *supra*, 39 Cal.App.4th at p. 519.) Put another way, evidence offered to prove a meaning to which the contract is susceptible "does not contravene the merger clause. [Citations.]" (2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 71, p. 190.)

In sum, parol evidence is not admissible to contradict a contract's terms, but it may be admitted to interpret those provisions in a proper case, even where the parties have included an integration clause. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 37; *Haggard v. Kimberly Quality Care*, *Inc.*, *supra*, 39 Cal.App.4th at p. 519.)

4. Conclusions

a. The Evidence is Admissible

Assuming that the trial court in fact decided to admit the proffered extrinsic evidence in the summary adjudication proceeding, its decision would be proper. We base that conclusion on a three-step analysis, in which all three steps present questions of law.

First, the threshold requirement for the admission of extrinsic evidence is satisfied: the contract is susceptible to Plantronics' interpretation that the anti-assignment clause covers the merger. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 37; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 645-646.)

Second, the evidence of the parties' negotiating history is undisputed. (See *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, *supra*, 109 Cal.App.4th at p. 960 [summary judgment is proper where the competent extrinsic evidence is not in conflict]; *Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166 [same]; cf., *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 488 [summary judgment is not proper where evidence of intent is disputed].) There is no disagreement as to either the fact or content of the precontract conversation between the parties' chief executives. Nor is there any dispute concerning the rejected draft PPA or the prior supply contract's terms. Only the legal significance of that evidence is disputed. Contrary to GN/HDI's suggestion, the absence of explicit language identifying a reverse triangular merger as an event triggering the anti-assignment clause does not transform the question into one of disputed fact or inference. (Cf., *Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at p. 655 ["failure to expressly exclude uncontemplated" events from the contract "is immaterial"].)

Third, the proffered parol evidence does not contradict the anti-assignment clause in any way. To the contrary, it helps explain it. The parties' negotiating history illuminates their intent that the contractual phrase "by operation of law or otherwise" would include merger.

We therefore approve the trial court's implicit decision to admit parol evidence.

b. The Trial Court's Interpretation is Correct

We next consider whether the trial court properly interpreted the anti-assignment provision. Exercising our independent judgment, we agree that the parties intended the anti-assignment clause to cover HDI's merger with GN. For one thing, the language of the clause is broad. It covers *all* types of assignments, "whether by operation of law or otherwise." It declares that *all* rights under the contract are "personal to the parties," with the sole exception of the right to payment. For another thing, as explained above, there is clear and undisputed extrinsic evidence of the parties' intent to embrace this very event within the clause. Before signing the agreement, the parties' representatives specifically discussed "a clause in the contract that would protect . . . Plantronics" in the event of such a merger. GN/HDI's Glover later identified that clause as the anti-assignment provision. Given both the language of the clause and the evidence explaining the parties' intent, we interpret the clause the same way the trial court did, as inclusive of the HDI-GN merger. We therefore reject GN/HDI's contention that the trial court "effectively re-wrote the anti-assignment provision."

In sum, considering the relevant contract language, together with the properly admitted and undisputed extrinsic evidence that helps explain it, we conclude that the anti-assignment provision was intended to cover HDI's merger with Plantronics' competitor, GN. The parties' intent with respect to the scope of the anti-assignment clause thus was established as a matter of law.

C. Contract Termination

GN/HDI's other challenge to the summary adjudication of its contract claims relates to Plantronics' termination of the contract. According to GN/HDI, there are unresolved material factual disputes arising from the timing of Plantronics' termination of the contract. First, GN/HDI argues, the termination was premature, because it occurred before the merger was accomplished. Furthermore, GN/HDI contends, Plantronics violated the notice requirements of the contract's termination provisions.[6]

In response, Plantronics argues that GN/HDI's entry into the definitive merger agreement constituted an anticipatory breach of the PPA. Thus, Plantronics maintains, it was justified in terminating the contract immediately, and it was justified in refusing to give GN/HDI notice or an opportunity to cure its breach, which was inherently incurable in any event.

In reply, GN/HDI first counters on the procedural ground that Planatronic never offered its anticipatory breach theory below. As to that point, we reiterate the nature of our review: we analyze the court's ruling on summary adjudication for its correctness on any theory. (*Martinez v. Scott Specialty Gases*, *Inc.*, *supra*, 83 Cal.App.4th at p. 1244.)

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[6]The contract's termination provisions are found in paragraphs 10.2 and 10.3.

The first provision is entitled "No Termination for Convenience." It permits termination by either party, with or without cause, on 120 days' notice.

The second provision is entitled "Termination for Cause." It permits either party to terminate the agreement on 30 days' notice, in specified circumstances, including (a) material nonperformance or repudiation of the contract, and (b) corporate dissolution, insolvency, or bankruptcy. As relevant here, the for-cause termination clause provides: "Either party shall have the right to terminate this Agreement and any undelivered purchase orders: [¶] (a) Upon thirty (30) days advance written notice to the other party regarding the material nonperformance or repudiation of any other substantive obligations of this Agreement by the other party and the failure of the defaulting party to cure such nonperformance or repudiation within thirty (30) days after the written notice is received or such additional cure period as the non-defaulting party may authorize in writing."

Substantively, GN/HDI argues that Plantronics' anticipatory breach theory has no merit in any event. We address that argument now.

1. Was The Contract Termination Premature?

Plantronics' contract termination preceded GN/HDI's merger by 17 days. As justification for the timing of the termination, Plantronics argues that HDI repudiated the contract by agreeing to merge with GN. To assess the merit of Plantronics' repudiation argument, we first review the applicable legal principles.

a. Anticipatory Breach: General Principles

The phrase "anticipatory breach" is a shorthand way of referring to a breach of contract by anticipatory repudiation. (Rest.2d Contracts, § 253, com. a, p. 286; see *Taylor v. Johnston* (1975) 15 Cal.3d 130, 137; *Gold Min. & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29.)

"Anticipatory breach occurs when one of the parties to a bilateral contract repudiates the contract." (*Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 137; accord, *Romano v. Rockwell Internat.*, *Inc.* (1996) 14 Cal.4th 479, 489; see generally, 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts § 805, pp. 726-727; 9 Corbin on Contracts (interim ed. 2002), § 959, pp. 756-759; Rest.2d Contracts, § 250, pp. 272-276.) "The repudiation may be express or implied. An express repudiation is a clear, positive, unequivocal refusal to perform [citations]; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible [citations]." (*Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 137; see generally, 1 Witkin, Summary of Cal. Law, *supra*, Contracts §§ 807, 808, pp. 728-730; 9 Corbin on Contracts, *supra*, § 973, pp. 801-809; *id.* § 984, pp. 840-842; Rest.2d Contracts, § 250, pp. 272-276.)

"In order for a statement or an act to be a repudiation, the threatened breach must be of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach . . . ." (Rest.2d Contracts, § 250, com. d,

p. 274.) Thus, "the repudiation must be either with respect to the entire performance that was promised or with respect to so material a part of it as to go to the essence. It must involve a total and not merely a partial breach." (9 Corbin on Contracts, *supra*, § 975, p. 812, fn. omitted; see also, *Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 140; *Gold Min. & Water Co. v. Swinerton*, *supra*, 23 Cal.2d at p. 29.)

The party repudiating a contract may retract the repudiation before the other party acts on it. When that happens, the repudiation is nullified. (*Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 138; *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 19-20; see generally, 1 Witkin, Summary of Cal. Law, *supra*, Contracts § 810, pp. 730-731; 9 Corbin on Contracts, *supra*, § 980, pp. 823-828; Rest.2d Contracts, § 256, pp. 293-296.)

A material repudiation left unretracted operates as a total breach, excusing the other party's performance. (Civ. Code, § 1440; *County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1276; Rest.2d Contracts, § 253, p. 286; 9 Corbin on Contracts, *supra,* § 975, pp. 811-813.) "When a promisor repudiates a contract, the injured party faces an election of remedies: he can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time." (*Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 137, citing *Guerrieri v. Severini*, *supra*, 51 Cal.2d at pp. 18-19; see generally, 1 Witkin, Summary of Cal. Law, *supra*, Contracts § 806, pp. 727-728; *id.* (2003 supp.) § 806, pp. 472-473.)

b. Application

Based on the foregoing principles, Plantronics argues that HDI's definitive merger agreement with GN constituted a repudiation of the contract, both express and implied.

Plantronics first urges express repudiation. It contends that HDI declared its intent to breach the contract by agreeing to engage in an action that was expressly prohibited by the contract, a merger with GN. As Plantronics points out, when a contracting party definitely and unequivocally declares its intent to breach the agreement, the declaration alone effects an express repudiation. (See, e.g., *Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 138 [finding an express repudiation, where the defaulting party stated that the other party was "released"]; cf., e.g., *Martinez v. Scott Specialty Gases*, *Inc.*, *supra*, 83 Cal.App.4th at p. 1247 [finding no express repudiation of prior employment policies, where employer's new personnel handbook "superseded" the old].) "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible. [Citations.]" (*Crane v. East Side Canal etc. Co.* (1935) 6 Cal.App.2d 361, 367 [conveyance of water rights constituted an anticipatory breach of defendant's contract to furnish plaintiff with water].)

GN/HDI vigorously disagrees that it expressly repudiated the contract, urging that its conduct was the antithesis of repudiation. GN/HDI contends that the evidence demonstrated its desire and its expressed intent to continue distributing Plantronics' headsets, as called for in the PPA.

We are not persuaded by GN/HDI's argument. We acknowledge GN/HDI's declared desire to continue performing under the contract. Nevertheless, we conclude that the definitive merger agreement and its announcement operated as an express repudiation. With the agreement and the announcement, HDI declared its intent to merge with Plantronics' chief rival. The prospective merger would violate the contract's anti-assignment clause. As such, HDI's agreement to merge with Plantronics' chief rival jeopardized the very essence of the contract, as demonstrated by Plantronics' expressed reservation about entering the PPA without protection from that possibility. The merger agreement and announcement thus explicitly signaled HDI's material anticipatory breach and constituted an express repudiation.

Under our analysis, the ultimate outcome of the merger is immaterial. The repudiation occurred with HDI's declaration of its anticipated breach, regardless of whether it actually breached the contract by finalizing the merger. As events unfolded, Plantronics acted on the express repudiation and exercised its election to terminate the contract. At that point, HDI lost the ability to retract its repudiation, even if the merger had not been completed.

We likewise dismiss as immaterial HDI's misapprehension of the effect of the reverse triangular merger on the anti-assignment clause. "Generally, a party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty. His statement is a repudiation if the threatened breach would, without more, have given the injured party a claim for damages for total breach." (Rest.2d Contracts, § 250, com. d, pp. 274-275.)

To sum up, we conclude that HDI expressly repudiated the contract at the time its definitive merger agreement with GN was announced. In light of that conclusion, we need not decide whether the definitive merger agreement also constituted an implied repudiation by rendering HDI powerless to perform the PPA without breaching the anti-assignment provision. (See *Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 137.)

We therefore turn to GN/HDI's argument concerning notice.

2. Was GN/HDI Entitled to Notice of Termination?

GN/HDI argues that summary adjudication was improper because of a material factual dispute concerning notice. Specifically, it asserts, Plantronics violated the contract's termination provisions, which required at least 30 days' notice.

We disagree. It is well established that "the normal effect of repudiation" by one party to a contract "is the excuse of performance" by the other party. (*Naify v. Pacific Indemnity Co.* (1938) 11 Cal.2d 5, 10; accord, *Guerrieri v. Severini*, *supra*, 51 Cal.2d at

p. 18; *Gold Min. & Water Co. v. Swinerton*, *supra*, 23 Cal.2d at p. 33.) Thus, when the injured party elects to "treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract," that election has the effect of "terminating the contractual relation . . . ." (*Taylor v. Johnston*, *supra*, 15 Cal.3d at p. 137; accord, *Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 489.)

As we explained above, Plantronics acted on HDI's express repudiation by electing to terminate the contract. As a result, Plantronics' performance under the contract was entirely excused. Plantronics thus was relieved of its contractual obligation to give HDI notice of termination. Having reached this conclusion, we need not consider whether HDI was entitled to an opportunity to "cure" its anticipatory breach by rescinding the merger. (Cf., Com. Code, § 2508 [seller's statutory right to cure nonconforming tender or delivery of goods]; *Aamco Industries, Inc. v. DeWolf* (1977) 250 N.W.2d 835 [under Minnesota law, statutory requirement of notice and opportunity to cure not enforced where it would be futile].)

D. Contract Claims: Summary of Conclusions

The trial court properly granted Plantronics' motion for summary adjudication of GN/HDI's contract claims. With respect to the contract's anti-assignment clause, Plantronics' admissible and undisputed parol evidence established the parties' intent as a matter of law. The contract's anti-assignment provision is properly interpreted as embracing HDI's merger with Plantronics' competitor, GN. With respect to the contract's termination provisions, HDI expressly repudiated the contract by entering the definitive merger agreement with GN. As a result, Plantronics was excused from performance under the contract, including compliance with its notice provisions.

Having considered and rejected GN/HDI's contract arguments, we now turn to its challenge to one of the trial court's evidentiary rulings.

II. Exclusion of Evidence

GN/HDI claims that the trial court erred in excluding evidence of industry standards and Plantronics' own internal policies, which prohibit "unhooking" customers from distributors. GN/HDI argued below that those standards and policies exist and that Plantronics violated them with its telephone call campaign. According to GN/HDI, the excluded evidence was relevant both to its claim for interference with prospective economic advantage, which was tried to the jury, and to its claim for unfair competition, which was tried to the court. GN/HDI contends that the trial court's ruling hampered its ability to prove to the jury that Plantronics' conduct was "wrongful"—an element of its interference claim, because the ruling prevented GN/HDI from showing that Plantronics' conduct was "unfair"—an element of its unfair competition claim.

In assessing GN/HDI's contentions, we first explain the legal principles that guide our analysis. We then apply those principles to the evidentiary ruling at issue here.

A. Legal Principles

1. Standard of Review

We review the trial court's decision to exclude evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) A party challenging a trial court's discretionary rulings on motions in limine must demonstrate both an abuse of discretion and a consequent miscarriage of justice. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456.)

2. Exclusion of Evidence: Evidence Code Section 352

"Under [Evidence Code] section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; see also, e.g., *Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.) The process of determining admissibility thus contemplates two steps:

(1) assessing the probative value of the evidence and (2) weighing that value against the potential for prejudice, confusion, or delay. "The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. [Citations.]" (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314.)

The first step in the balancing process is to evaluate the probative value of the proffered evidence. The probative value of evidence depends on its relevance. "The trial court retains broad discretion in determining the relevance of evidence. [Citation.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) "Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)" (*People v. Waidla*, *supra*, 22 Cal.4th at p. 718.)

The relevance of proffered evidence thus depends on whether it supports the elements of a party's claim. "Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. [Citations.]" (*Fuentes v. Tucker* (1947) 31 Cal.2d 1, 4-5.)

In this case, the claim in question is GN/HDI's cause of action for interference with prospective economic advantage.

3. Interference with Prospective Economic Advantage

The tort of intentional interference with prospective economic advantage imposes liability for wrongful conduct that disrupts the business relationship of another and that falls outside the bounds of fair competition. (*PMC*, *Inc. v. Saban Entertainment*, *Inc.* (1996) 45 Cal.App.4th 579, 595, disapproved on another ground in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, fn. 11.) "One may compete for an advantageous economic relationship with a third party as long as one does not act improperly or illegally." (*Bed*, *Bath & Beyond of La Jolla*, *Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 880.)

A "plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.' [Citation.]" (*Della Penna v. Toyota Motor Sales*, *U.S.A.*, *Inc.* (1995) 11 Cal.4th 376, 392-393, fn. omitted (*Della Penna*); accord, *Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at pp. 1158-1159; *Gemini Aluminum Corp. v. California Custom Shapes*, *Inc.* (2002) 95 Cal.App.4th 1249, 1256 (*Gemini*).) "In *Della Penna*, the court declined to specify the scope of interference that would qualify as 'wrongful.' " (*Gemini*, *supra*, 95 Cal.App.4th at p. 1258, citing *Della Penna*, *supra*, 11 Cal.4th at p. 393.) The California Supreme Court has since clarified "that an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at p. 1159, footnote and citation omitted.) And even in its earlier decision in *Della Penna*, the court did state that wrongfulness is to be gauged "by some *legal* measure other than the fact of interference itself." (*Della Penna*, *supra*, 11 Cal.4th at p. 393, italics added.) In his concurring opinion in *Della Penna*, Justice Mosk opined: "It follows that the tort may be satisfied by intentional interference with prospective economic advantage by *independently tortious means.* [Citations.]" (*Id.* at p. 408 (conc. opn. of Mosk, J.).) By requiring the actionable conduct to be independently tortious, Justice Mosk said, "one would not be left to the scant 'guidance' of the so-called ' "business ethics" standard' [citation], which presupposes that '[t]he nature of the conduct which is acceptable today may . . . prove unacceptable tomorrow' [citation]." (*Id.* at p. 411 (conc. opn. of Mosk, J.).) Some courts of appeal likewise have concluded that "wrongfulness" in this context requires conduct that is independently actionable, such as the violation of a statute or the commission of a tort. (See, e.g., *San Francisco Design Center Associates v. Portman Companies* (1995) 41 Cal.App.4th 29, 42-43; *Gemini*, *supra*, 95 Cal.App.4th at p. 1259.) Furthermore, as relevant here, the Court of Appeal that decided *Gemini* explicitly rejected the use of industry standards as a basis for liability for this tort, concluding that "the nebulous 'industry standards' test advanced by [plaintiff] does not satisfy *Della Penna*'s requirement that the defendant's conduct 'was wrongful by some *legal measure* other than the fact of interference itself.' [Citation.]" (*Gemini*, *supra*, 95 Cal.App.4th at p. 1259, quoting *Della Penna*, *supra*, 11 Cal.4th at p. 393.)

B. Analysis

Against this background, we examine the trial court's decision to exclude evidence of industry standards and Plantronics' internal policies proscribing "unhooking."

1. Relevance

Addressing the first step in the weighing process—relevance—the trial court stated: "Industry standards and internal policies, to my way of thinking, only come in if they're probative to show wrongful conduct, wrongful act in the competitive arena. And they are relevant only for that reason." Citing *Della Penna* and *Gemini*, the trial court explained its decision to exclude the proffered evidence. First, the court said, "an industry standard is, I think, too nebulous for our competitive economic arena and . . . ought not to be considered or allowed for purposes of wrongful conduct." Second, the court expressed concern that the jury "would essentially hear an argument in the form of [expert] testimony." "Thirdly," the court said, "I am not convinced, nor have I heard that there is an industry standard that fits this situation." The court then added: "This analysis, I think, also applies to the internal policies of Plantronics."

It is within the trial court's discretion to make such an assessment. The statutory "balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it . . . ." (*Kessler v. Gray*, *supra*, 77 Cal.App.3d at p. 291.) Here, the court concluded that the evidence of standards and policies did not tend to prove wrongful conduct, the only purpose for which it was offered. We agree with the trial court's conclusion that the evidence was not probative of the wrongfulness element of GN/HDI's interference claim. (See *Gemini*, *supra*, 95 Cal.App.4th at p. 1259.) Thus, in our view, both the manner and the result of the court's exercise of discretion are proper.

It bears noting, moreover, that the court did admit and consider the proffered evidence in the bench trial of GN/HDI's unfair competition claim. But despite admitting evidence of industry standards and internal policies concerning "unhooking" in that trial, the court denied the claim. In doing so, the court found that Plantronics' call campaign "was not an unfair business practice." The court also found that "there was, and is, no industry standard or internal policy dealing with the unique circumstances confronting Plantronics" at the time of the merger. Thus, the court concluded, Plantronics' conduct in calling customers "was not unreasonable or unfair after Hello Direct's acquisition by Plantronics' major competitor." GN/HDI thus failed to prove that Plantronics' call campaign was unfair, a fact that supports the court's earlier determination that the evidence was not probative of wrongfulness.

In sum, the trial court correctly determined that the "unhooking" evidence was not relevant to GN/HDI's interference claim.

2. Prejudice

Having determined that the proffered evidence lacked probative value and thus was irrelevant, the trial court nevertheless noted the existence of statutory factors supporting exclusion. As the court put it: "And on a [Evidence Code section] 352 basis alone, I think the danger of confusion, time consumption and things of that sort [out]weighs the probative value of offering this evidence."

The two-step statutory balancing process contemplates that the trial court will weigh the probative value of proffered evidence against its potential for prejudice, confusion, and the undue consumption of time. (Evid. Code, § 352.) But there is no rule that "any evidence, however remote, must be admitted" or even that it must be subjected to the weighing process. (*People v. Johnson* (1988) 200 Cal.App.3d 1553, 1563.) Thus, for example, where a criminal defendant's proffered evidence "could not logically raise a reasonable doubt about his guilt, the trial court properly excluded it" without weighing the statutory factors supporting exclusion. (*Id.* at p. 1564.) Far from being required to admit irrelevant evidence, a trial court errs in doing so. (*Fuentes v. Tucker*, *supra*, 31 Cal.2d at pp. 4-5.)

In this case, given its correct determination of irrelevance, the trial court need not have considered prejudice. For that reason, we will not address that part of its analysis here.

To sum up, we agree with the court's determination that the proffered evidence was irrelevant to GN/HDI's interference claim, and we affirm the court's decision to exclude that evidence from the jury.

III. Attorney Fees and Costs

GN/HDI's final contention on appeal is that the trial court erred in awarding attorney fees and costs to Plantronics. That contention rests entirely on GN/HDI's claim that Plantronics was not entitled to defense summary adjudication of its contract claims.

Given our determination that the trial court properly granted summary adjudication in Plantronics' favor, we affirm the fee award.

DISPOSITION

We deem the judgment in this case to be the amended judgment, which was submitted to this court in January 2004 and filed in the superior court in March 2004. That judgment shall be entered, nunc pro tunc, as of November 15, 2002. As so entered, the judgment is affirmed. Therefore, as set forth therein, Plantronics shall recover from GN/HDI the net amount of $852,748, plus prejudgment interest on that amount from March 15, 2001 to November 15, 2002. Plantronics also shall be entitled to postjudgment interest from and after November 15, 2002, as previously ordered by the trial court.

We affirm the supplemental judgment filed in March 2003, which awarded Plantronics its attorney fees and costs.

Plantronics shall recover its costs on appeal.

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McAdams, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.